

DOCKET FILE COPY ORIGINAL

RECEIVED

JUL 21 1992

SUTHERLAND, ASBILL & BRENNAN

1275 PENNSYLVANIA AVENUE, N. W.

WASHINGTON, D. C. 20004-2404

(202) 383-0100

CABLE: SUTAB WASHINGTON  
TELEX: 89-501  
FACSIMILE:  
(202) 637-3593

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
999 PEACHTREE STREET, N.E.  
ATLANTA, GEORGIA 30309-3996  
(404) 853-8000

July 21, 1992

FRANK J. MARTIN, JR.  
DIRECT LINE: (202) 383-0146

93-178

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554


Re: In re Application of Howard B. Dolgoff  
File No. BPH-911223ME  
Channel 292A, Miramar Beach, Florida

Dear Ms. Searcy:

Pursuant to Section 73.3584(b) of the Commission's Rules, submitted herewith for filing are an original and four copies of a Reply to Opposition to Petition to Deny the above-captioned application.

Should there be any questions concerning this Reply, please contact the undersigned or Elizabeth C. Buckingham of this office.

Respectfully submitted,

  
Frank J. Martin, Jr.  
Attorney for  
Mark and Reneé Carter

Attachments  
cc: per Certificate of Service

FM EXAMINERS

JUL 22 3 20 PM '92

RECEIVED

**JUL 21 1992**

# Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

~~~~~

1/ On June 4, 1992, the Carters filed their Petition to Deny. On June 8, 1992, Dolgoff requested an extension of time to respond until July 9, 1992. On June 10, 1992 (not July 10, 1992 as erroneously stated in Dolgoff's Opposition), the Carters filed comments stating that they would not interpose any objection to the extension of time requested by Dolgoff.

grandfathered short-spacing <sup>2/</sup> and for failure to seek processing under or demonstrate compliance with the contour protection provisions of Section 73.215 of the Rules.

2. While his Opposition asserts that Dolgoff "properly relied on processing pursuant to Section 73.213," <sup>3/</sup> neither the Opposition nor the appended Engineering Statement <sup>4/</sup> undertakes to demonstrate that -- or even to address whether -- his proposal meets the specific requirements for grandfathering detailed in Section 73.213(c) and made the focus of the Carters' Petition to

~~Deny. Instead, Dolgoff falsely accuses the Carters of an action~~

Commission's Memorandum Opinion and Order in MM Docket No. 88-375 to the effect that it "'will permit facility enhancements sought pursuant to § 73.213 that retain current coverage in directions where overlap exists, provided no new predicted interference is created to the current service of any other short-spaced co-channel and adjacent channel licensees.'" 2/ It is evident from language Dolgoff quotes, as well as from its context, 3/ that this reference relates only to short-spaced service that is already established, not to newly proposed short-spacing contained in applications for allocations. See Technical Exhibit 1 to the Reply, Engineering Statement of Bromo Communications, at 4.

4. Dolgoff's reliance in his Opposition on unfounded accusations and implications, rather than on specifics, betrays an effort to deflect attention from the fundamental deficiencies of his proposal. 7/ The Parties are confident that when

attention is focused on Dolgoff's engineering proposal, its shortcomings will be readily apparent.

5. It can be inferred from the Engineering Statement appended to Dolgoff's Opposition (see Exhibit A to the Opposition at 3), that Dolgoff believes that his use of a directional antenna to reduce power to 3 kW ERP or less on some but not all radials, should, under a very liberal interpretation of Section 73.213(c)(1), permit his proposal to be viewed as meeting the specific requirements of that paragraph as to those radials where ERP is 3 kW or less. But even if this were so, it would not make his directional proposal acceptable with respect to radials on which ERP will exceed 3kW absent a request for processing under, and a demonstration of compliance with, the contour protection provisions of Section 73.215 of the Rules. Not only does Dolgoff's proposal fail to seek processing pursuant to Section 73.215, and fail to demonstrate that contour protection required by that section will be provided, the appended Engineering Statement of Bromo Communications shows that Dolgoff's proposal does not provide the required contour protection and in fact produces prohibited overlap of pertinent contours.

## **II. DOLGOFF'S APPLICATION MUST BE DISMISSED AS DEFECTIVE**

6. Dolgoff's application fails to meet the tenderability and acceptability standards governing these applications and must be dismissed. When the Commission amended its Rules to permit the filing of short-spaced applications using directional antennas, it required applicants to include an exhibit

demonstrating that the contour protection required by Section 73.215 would be achieved. Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, 4 FCC Rcd 1681, 1686 (1989) (subsequent history omitted). The FCC added this requirement for an exhibit to its list of tender criteria so that "an applicant's failure to submit the appropriate exhibit will result in the return of the application as not substantially complete at tender." *Id.* Because Dolgoff's application failed to satisfy

8. While the Commission recently relaxed its FM processing rules to permit new applicants to correct tenderability and acceptability defects, these revised rules have no application to this proceeding. In the News Release summarizing its decision, the Commission stated unequivocally that "it would apply the new rules to all commercial band FM applications for construction permits, filed after the effective date of the new rules" and that "[t]he new rules would have no effect on currently pending applications." FCC Relaxes its "Hard Look" Approach to Processing Commercial FM Applications, Report No. DC-2173, MM Docket No. 91-347, at 2 (released July 16, 1992) (emphasis supplied). Accordingly, Dolgoff's application must be dismissed for both tenderability and acceptability defects.

III. CONCLUSION

Wherefore, Dolgoff's Opposition must be dismissed and his captioned application must be denied as patently in violation of the Commission's rules. The Carters' application should therefore be promptly granted.

Respectfully submitted,

MARK AND RENEE CARTER



COMMENTS IN REPLY TO  
OPPOSITION TO PETITION TO DENY  
THE APPLICATION BY  
HOWARD B. DOLGOFF  
NEW FM RADIO STATION  
MIRAMAR BEACH, FLORIDA  
JULY 1992

Technical Exhibit  
TE-1

Bromo Communications, Inc.  
P.O. Box M - 1331 Ocean Boulevard, Suite 201  
St. Simons Island, Georgia 31522  
(912) 638-5608

Copyright 1992 - All rights reserved

COMMENTS IN REPLY TO  
OPPOSITION TO PETITION TO DENY  
THE APPLICATION BY  
HOWARD B. DOLGOFF  
NEW FM RADIO STATION  
MIRAMAR BEACH, FLORIDA  
JULY 1992

This Technical Report supports the comments in reply by Mark and Renee' Carter ("CARTER") to the opposition to the petition to deny the application by Howard B. Dolgoff ("DOLGOFF").

BACKGROUND

Dolgoff amended his application for a Construction Permit for a New FM Radio Station on Channel 292A in Miramar Beach, Florida (FCC File No. BPH-911223ME) on May 4, 1992. In the amendment Dolgoff proposes to utilize "the provisions of §73.213 and the Memorandum Opinion and Order released May 30, 1991 in reconsideration of MM Docket 88-375." relating to the minimum distance separation requirements, to co-channel station WKNV, Brewton, Alabama. Dolgoff therefore recognizes that the allocation for Channel 292A at Miramar Beach is shortspaced under §73.207 of the Commission's rules to WKNV. But since this shortspacing resulted solely from the increase in the spacing requirements made subsequent to the filing of the petition that resulted in the allocation, he seeks to utilize the grandfathering provisions of §72.213(c) addressed to such shortspacings. (Report and Order MM Docket #89-126.)

## DISCUSSION

§73.213(c) states that "an application for an allotment may be authorized, and subsequently modified after grant, in accordance with paragraph (c)(1) or (c)(2) of this Section ..." Dolgoff's application for the allotment does not appear to be in accordance with paragraph (c)(2) because it does not contain an exhibit demonstrating the consent of WKNU as required by that provision. His proposal, likewise, does not appear to be in accordance with paragraph (c)(1) because it proposes 6.0 kW maximum ERP, and paragraph (c)(1) states that it is applicable only to an "application for authority to operate a Class A station with no more than 3000 watts ERP and 100 meters HAAT ..."

Although there is no express provision for directional proposals under §73.213(c)(1), it is possible to construe that the Commission intended that a directional proposal would be acceptable under §73.213(c)(1) without regard to whether it would provide contour protection to a shortspaced station where its signal would be at or below 3 kW ERP at 100 meters HAAT or equivalent, provided that on radials where its signal exceeded that level, contour protection to the shortspaced station was demonstrated as required in §73.215 of the Rules. Such a combination of options could have been

contemplated by Option 3 for Category 2<sup>1</sup> applicants stated in the Commission's above-referenced Order on reconsideration in MM Docket 88-375:

Option 1 (paragraph 7) deals with facilities changes "... provided 3 kW at 100 m HAAT equivalency is not exceeded."

Option 2 (paragraph 8) deals with site changes "... within the area that qualifies them as Category 2. As in the first option 3 kW at 100 m HAAT equivalency must not be exceeded. ..."

Option 3 (paragraph 9) is for Category 2 stations "... to apply for a modification pursuant to the contour protection provisions of §73.215. ..."

Option 4 (paragraph 9) is for Category 2 stations "... if both involved stations are Class A stations. They both may increase to 6 kW at 100 m HAAT or it's equivalent if the increases are mutual ...".

Option 5 (paragraph 10) deals with "... a unilateral increase in facilities, up to a maximum of 6 kW at 100 m HAAT or it's equivalent, provided several conditions are met: (a) The consent of the affected station must be obtained; ..."

Option 6 (paragraph 10) "... to change site to meet the new (6 kW) spacing requirements, ...".

<sup>1</sup> "... Category 2 includes the situations where the station-to-station spacing is less than the minimum distance separation spacing is less than the minimum distance separation specified for the new 6 kW Class A stations, but more than the minimum specified for the old 3 kW Class A stations. ..."

Dolgoff did not seek processing under §73.215 and Option 3 for the part of his 6.0 kW directional proposal that exceeds 3 kW. Since he did not, and did not provide the contour protection showing required by §73.215, it does not appear that he is entitled to processing under §73.215. Dolgoff is an applicant in a contested proceeding and therefore is not empowered by the Commission to seek nor does he supply a mutual agreement with WKNU. Dolgoff is, therefore, disqualified from seeking processing under Options 4 or 5. Dolgoff specified a transmitter site shortspaced under §73.207 of the Rules, so his application does not qualify under Option 6.

Dolgoff implies that paragraph 40 of the May 1991 Order allows processing of his application.<sup>2</sup> We have analyzed this contention with extreme care. Dolgoff is an applicant for a new station. Since no facility is in existence, no enhancement of facility can be proposed by this application. Nor is there currently interference being delivered to WKNU from Miramar Beach. Further, there is no mutual agreement between Dolgoff and WKNU. Therefore, reference to Paragraph 40 does not apply here.

<sup>2</sup> "... we will permit facility enhancements sought pursuant to §73.213 that retain current coverage in directions where overlap exists, provided no new predicted interference is created to the current service of any other short-spaced co-channel and adjacent channel licensees."

Our analysis then leads us to conclude that if Dolgoff wishes to propose facilities in excess of 3 kW at 100 m HAAT, at the transmitter coordinates specified, his only option is to file his applications under the contour protection requirements of §73.215. He has not done so.

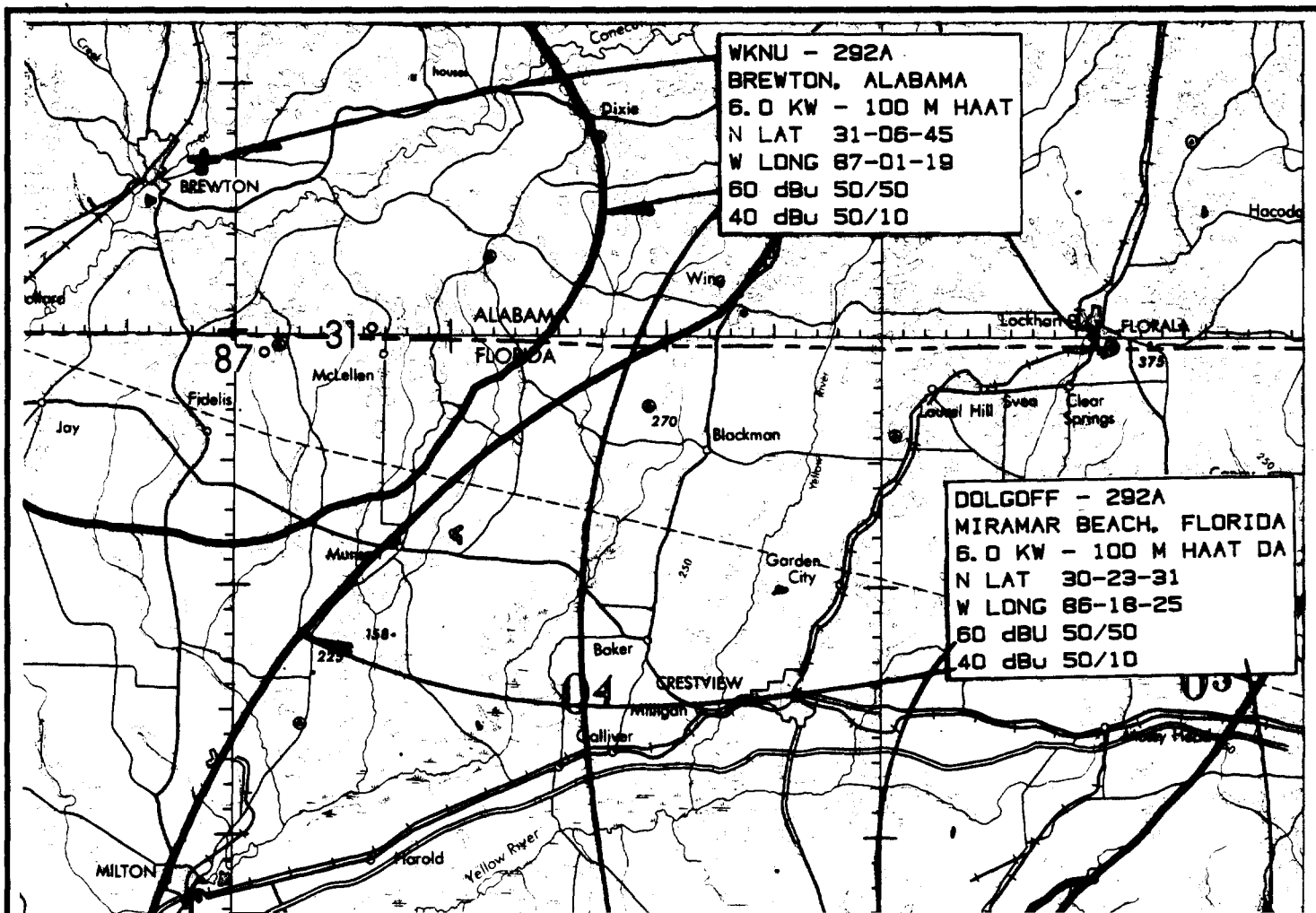
Dolgoff proposes greater than 3 kW at 100 m HAAT service. In employing the contour protection requirements of §73.215 of the Commission's Rules, Dolgoff must assume WKNU as operating with a full 6.0 kW 100 meters height above average terrain Class A station. When Dolgoff's protected (60 dBu) and interfering (40 dBu) contours are projected, with WKNU operating as a maximum Class A facility, there is prohibited overlap of contours between the facilities. Exhibit #1 is a map demonstrating that Dolgoff's proposal would be subject to extensive interference contrary to §73.215 and is therefore unacceptable. Exhibits #2 and #3 are tabulations of the contour calculations used preparation of the map. Exhibit #4 is a tabulation of the Dolgoff and WKNU contours in a form similar to "FMOVER" also demonstrating prohibitive overlap.

#### SUMMARY

Since Dolgoff's application does not comply with any of the provisions of §73.213, under the circumstances outlined

above, the provisions of §73.215 must be applied to the Dolgoff Amendment. In light of the fact that the Amendment does not meet the requirements of §73.215, the Amendment must be returned as unacceptable.

All information contained in this report is true and accurate to the best of our belief and knowledge. Should any questions arise during its review, we would be happy to discuss the matter by phone at (912) 638-5608. All the data used in the preparation of this report was valid as of this writing. We assume no responsibility for database errors or omissions which are beyond our control and which may impact the potentials outlined herein.



Predicted Signal Contours:

30 23 31 - HOWARD B. DOLGOFF  
86 18 25 - 6.0 KW DIRECTIONAL

| ERP = 6 kW, 7.782 dBk FM - 2-6 Tables |        |        |                       |       |          |          |
|---------------------------------------|--------|--------|-----------------------|-------|----------|----------|
| Radial                                | HAAT   | kW     | dBk                   | Field | 60 dBu.5 | 40 dBu.1 |
| 250 Degr.                             | 102.1M | 6.000  | 7.782                 | 1.000 | 28.6     | 87.0     |
| 255 Degr.                             | 102.2M | 6.000  | 7.782                 | 1.000 | 28.6     | 87.0     |
| 260 Degr.                             | 101.7M | 6.000  | 7.782                 | 1.000 | 28.5     | 86.9     |
| 265 Degr.                             | 99.9M  | 6.000  | 7.782                 | 1.000 | 28.3     | 86.6     |
| 270 Degr.                             | 102.1M | 6.000  | 7.782                 | 1.000 | 28.6     | 87.0     |
| 275 Degr.                             | 102.2M | 4.860  | 6.866                 | 0.900 | 27.3     | 83.7     |
| 280 Degr.                             | 102.2M | 3.783  | 5.778                 | 0.794 | 25.8     | 79.9     |
| 285 Degr.                             | 102.2M | 3.008  | 4.782                 | 0.708 | 24.5     | 76.4     |
| 290 Degr.                             | 102.2M | 2.999  | 4.770                 | 0.707 | 24.5     | 76.3     |
| 295 Degr.                             | 102.2M | 2.999  | 4.770                 | 0.707 | 24.5     | 76.3     |
| 300 Degr.                             | 102.2M | 2.999  | 4.770                 | 0.707 | 24.5     | 76.3     |
| 305 Degr.                             | 102.2M | 2.999  | 4.770                 | 0.707 | 24.5     | 76.3     |
| 310 Degr.                             | 99.6M  | 2.999  | 4.770                 | 0.707 | 24.2     | 75.8     |
| 315 Degr.                             | 98.3M  | 2.999  | 4.770                 | 0.707 | 24.0     | 75.6     |
| 320 Degr.                             | 98.7M  | 2.999  | 4.770                 | 0.707 | 24.1     | 75.7     |
| 325 Degr.                             | 98.0M  | 2.999  | 4.770                 | 0.707 | 24.0     | 75.5     |
| 330 Degr.                             | 96.7M  | 2.999  | 4.770                 | 0.707 | 23.8     | 75.3     |
| 335 Degr.                             | 95.6M  | 3.008  | 4.782                 | 0.708 | 23.7     | 75.1     |
| 340 Degr.                             | 95.1M  | 3.783  | 5.778                 | 0.794 | 24.9     | 78.6     |
| 345 Degr.                             | 96.3M  | 4.860  | 6.866                 | 0.900 | 26.5     | 82.7     |
| 350 Degr.                             | 94.3M  | 6.000  | 7.782                 | 1.000 | 27.5     | 85.7     |
| 355 Degr.                             | 93.9M  | 6.000  | 7.782                 | 1.000 | 27.5     | 85.6     |
| -----                                 |        |        |                       |       |          |          |
| Ave. HAAT=                            |        | 99.5M, | Ant. COR= 102.2M AMSL |       |          |          |

EXHIBIT #2  
COMMENTS IN REPLY  
BY: MARK AND RENEE' CARTER  
TO: HOWARD B. DOLGOFF  
MIRAMAR BEACH, FLORIDA  
  
JULY 1992

Predicted Signal Contours:

31 06 45 - WKNU - BREWTON, AL  
87 01 19 - 6.0 KW NON-DIRECTIONAL

| ERP = 6 kW, 7.782 dBk FM - 2-6 Tables |        |       |       |       |          |          |
|---------------------------------------|--------|-------|-------|-------|----------|----------|
| Radial                                | HAAT   | kW    | dBk   | Field | 60 dBu.5 | 40 dBu.1 |
| 50 Degr.                              | 76.4M  | 6.000 | 7.782 | 1.000 | 24.9     | 82.4     |
| 55 Degr.                              | 73.4M  | 6.000 | 7.782 | 1.000 | 24.5     | 81.8     |
| 60 Degr.                              | 77.1M  | 6.000 | 7.782 | 1.000 | 25.0     | 82.6     |
| 65 Degr.                              | 81.9M  | 6.000 | 7.782 | 1.000 | 25.8     | 83.5     |
| 70 Degr.                              | 85.4M  | 6.000 | 7.782 | 1.000 | 26.3     | 84.1     |
| 75 Degr.                              | 90.3M  | 6.000 | 7.782 | 1.000 | 27.0     | 85.0     |
| 80 Degr.                              | 96.2M  | 6.000 | 7.782 | 1.000 | 27.8     | 86.0     |
| 85 Degr.                              | 103.1M | 6.000 | 7.782 | 1.000 | 28.7     | 87.2     |
| 90 Degr.                              | 107.2M | 6.000 | 7.782 | 1.000 | 29.2     | 87.9     |
| 95 Degr.                              | 109.0M | 6.000 | 7.782 | 1.000 | 29.5     | 88.1     |
| 100 Degr.                             | 109.9M | 6.000 | 7.782 | 1.000 | 29.6     | 88.3     |
| 105 Degr.                             | 108.5M | 6.000 | 7.782 | 1.000 | 29.4     | 88.1     |
| 110 Degr.                             | 104.3M | 6.000 | 7.782 | 1.000 | 28.9     | 87.4     |
| 115 Degr.                             | 101.2M | 6.000 | 7.782 | 1.000 | 28.5     | 86.9     |
| 120 Degr.                             | 97.5M  | 6.000 | 7.782 | 1.000 | 28.0     | 86.2     |
| 125 Degr.                             | 91.0M  | 6.000 | 7.782 | 1.000 | 27.1     | 85.1     |
| 130 Degr.                             | 83.3M  | 6.000 | 7.782 | 1.000 | 26.0     | 83.7     |
| 135 Degr.                             | 87.4M  | 6.000 | 7.782 | 1.000 | 26.5     | 84.5     |
| 140 Degr.                             | 90.6M  | 6.000 | 7.782 | 1.000 | 27.0     | 85.0     |
| 145 Degr.                             | 96.7M  | 6.000 | 7.782 | 1.000 | 27.9     | 86.1     |
| 150 Degr.                             | 99.4M  | 6.000 | 7.782 | 1.000 | 28.2     | 86.6     |
| 155 Degr.                             | 93.9M  | 6.000 | 7.782 | 1.000 | 27.5     | 85.6     |
| 160 Degr.                             | 92.0M  | 6.000 | 7.782 | 1.000 | 27.2     | 85.3     |
| 165 Degr.                             | 96.1M  | 6.000 | 7.782 | 1.000 | 27.8     | 86.0     |
| 170 Degr.                             | 99.6M  | 6.000 | 7.782 | 1.000 | 28.2     | 86.6     |
| 175 Degr.                             | 100.4M | 6.000 | 7.782 | 1.000 | 28.3     | 86.7     |
| 180 Degr.                             | 98.6M  | 6.000 | 7.782 | 1.000 | 28.1     | 86.4     |
| 185 Degr.                             | 93.8M  | 6.000 | 7.782 | 1.000 | 27.5     | 85.6     |
| 190 Degr.                             | 94.6M  | 6.000 | 7.782 | 1.000 | 27.6     | 85.7     |
| 195 Degr.                             | 97.0M  | 6.000 | 7.782 | 1.000 | 27.9     | 86.2     |
| 200 Degr.                             | 100.4M | 6.000 | 7.782 | 1.000 | 28.3     | 86.7     |
| 205 Degr.                             | 103.1M | 6.000 | 7.782 | 1.000 | 28.7     | 87.2     |
| 210 Degr.                             | 101.8M | 6.000 | 7.782 | 1.000 | 28.5     | 87.0     |
| 215 Degr.                             | 105.7M | 6.000 | 7.782 | 1.000 | 29.0     | 87.6     |
| 220 Degr.                             | 113.5M | 6.000 | 7.782 | 1.000 | 30.0     | 88.9     |

Ave. HAAT= 96.0M, Ant. COR= 146.0M AMSL

EXHIBIT #3  
COMMENTS IN REPLY  
BY: MARK AND RENEE' CARTER  
TO: HOWARD B. DOLGOFF  
MIRAMAR BEACH, FLORIDA

JULY 1992



AFFIDAVIT AND QUALIFICATIONS OF CONSULTANT

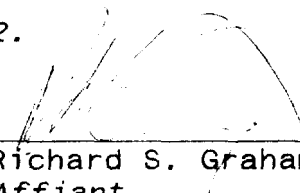
State of Georgia       )  
St. Simons Island     )               ss:  
County of Glynn       )

RICHARD S. GRAHAM, JR. being duly sworn, deposes and says that he is an officer of Bromo Communications, Inc. Bromo has been engaged by Mark and Renee' Carter to prepare the to prepare the attached Technical Exhibit.

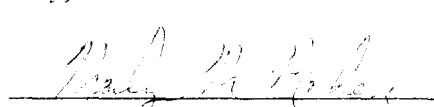
His qualifications are a matter of record before the Federal Communications Commission. He is a graduate of Auburn University and has been active in broadcast engineering since 1972.

The attached report was either prepared by him or under his direction and all material and exhibits attached hereto are believed to be true and correct.

*This the 20th day of July, 1992.*

  
\_\_\_\_\_  
Richard S. Graham, Jr.  
Affiant

Sworn to and subscribed before  
me this the 20th day of  
July, 1992.

  
\_\_\_\_\_  
Notary Public, State of Georgia  
My Commission Expires: September 8, 1995


**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of July, 1992, a copy of the foregoing Petition to Deny has been served by U.S. mail, postage paid, upon the following:

Irving Gastfreund, Esq.  
Kaye, Scholer, Fierman, Hays & Handler  
901 15th Street, N.W.  
Washington, DC 20005

Charles Dziedzic, Esq.\*  
Hearing Branch of the Mass Media Bureau  
2025 M Street, N.W., Room 7212  
Washington, DC 20554

Chief, Data Management Staff\*  
Federal Communications Commission  
Audio Services Division  
Mass Media Bureau  
1919 M Street, N.W., Room 350  
Washington, DC 20554

  
Frank J. Martin, Jr.

\* By hand delivery